Supreme Court, U.S.
FILED
MAY 21 2007
OFFICE OF THE CLERK

No. 06-1221

IN THE

Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

PAUL W. CANE, JR.
Counsel of Record
KATHERINE C. HUIBONHOA
HEATHER N. MITCHELL
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
55 Second Street,
Twenty-Fourth Floor
San Francisco, CA 94105
(415) 856-7000

Attorneys for Petitioner

208750

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
I. A Substantial Inter-Circuit Conflict Exists.	1
A. The Tenth Circuit's Decision Is Not Fact-Specific.	1
B. The Tenth Circuit's Decision Conflicts With Decisions From At Least Five Other Circuits.	3
C. The Tenth Circuit's Own Cases Also Are In Disarray, But Whether They Can Be Reconciled Is Beside The Point.	7
II. The Rule 403 Issue Is Properly Presented.	7
A. Rule 403 Findings Are Not Required.	7
B. The Court Of Appeals Stripped District Courts Of Discretion To Exclude Evidence Under Rule 403.	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Becker v. Arco Chemical Co.,
207 F.3d 176 (3d Cir. 2000) 4

Crane v. Kentucky,
476 U.S. 683 (1986) 8

Glass v. Philadelphia Elec. Co.,
34 F.3d 188 (3d Cir. 1994) 4, 9

Harpring v. Continental Oil Co.,
628 F.2d 406 (5th Cir. 1980) 5

Haskell v. Kaman Corp.,
743 F.2d 113 (2d Cir. 1984) 3, 10

Holmes v. South Carolina,
547 U.S. 319, 126 S. Ct. 1727 (2006) 8

Honor v. Booz-Allen & Hamilton, Inc.,
383 F.3d 180 (4th Cir. 2004) 4

Huddleston v. United States,
485 U.S. 681 (1988) 7

Hunter v. Allis-Chalmers Corp.,
797 F.2d 1417 (7th Cir. 1986) 6

Kozlowski v. Hampton School Bd.,
77 Fed. Appx. 133 (4th Cir. 2003) 4

Cited Authorities

Page

Martin v. Citibank, N.A.,
762 F.2d 212 (2d Cir. 1985) 3

Moorhouse v. Boeing Co.,
501 F. Supp. 390 (E.D. Pa.),
aff'd, 639 F.2d 774 (3d Cir. 1980) 3, 4

Navarro de Cosme v. Hospital Pavia,
922 F.2d 926 (1st Cir. 1991) 8

Schrand v. Federal Pacific Electric Co.,
851 F.2d 152 (6th Cir. 1988) 6

Shattuck v. Kinetic Concepts, Inc.,
49 F.3d 1106 (5th Cir. 1995) 5

Smith v. Tenet Healthsystem SL, Inc.,
436 F.3d 879 (8th Cir. 2006) 8

Stumph v. Thomas & Skinner, Inc.,
770 F.2d 93 (7th Cir. 1985) 6

Teamsters v. United States,
431 U.S. 324 (1977) 5

United States v. 50 Acres of Land,
469 U.S. 24 (1984) 7

United States v. Bradshaw,
935 F.2d 295 (D.C. Cir. 1991) 8

United States v. Cruz-Garcia,
344 F.3d 951 (9th Cir. 2003) 7

Cited Authorities

Page

United States v. Long,
574 F.2d 761 (3d Cir. 1978), *cert. denied*,
439 U.S. 985 (1978) 7

United States v. McVeigh,
153 F.3d 1166 (10th Cir. 1998) 9

United States v. Ono,
918 F.2d 1462 (9th Cir. 1990) 8

United States v. Pitre,
960 F.2d 1112 (2d Cir. 1992) 8

Williams v. Nashville Network,
132 F.3d 1123 (6th Cir. 1997) 6

Wyvill v. United Companies Life Ins. Co.,
212 F.3d 296 (5th Cir. 2000) 4

Rules:

Fed. R. Evid. 401 1

Fed. R. Evid. 403 ..... *passim*

Other Authorities:

Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 603 (3d ed. 1996) 2, 5, 10

Jack B. Weinstein & Margaret A. Berger, 1 *Weinstein's Federal Evidence* § 403.02 (Joseph M. McLaughlin ed., 2006) 8

If a discriminatory employment decision is made, it is made by a supervisor or manager — the decisionmaker — delegated with authority to act on behalf of the employing entity. The *relevant* evidence in a discrimination case therefore is evidence on the thought processes and the biases *vel non* of that decisionmaker. As shown in the petition, this Court's cases properly have focused on evidence of the decisionmaker's motivation. Here, however, the Tenth Circuit majority held it to be reversible error for a district court to exclude allegations of discrimination by persons who had no connection with the plaintiff. In doing so, the Tenth Circuit applied a rule of law that departs from that in at least five other circuits.

I. A Substantial Inter-Circuit Conflict Exists.

Mendelsohn misstates the holdings of the cases she cites. As shown below, other circuits have squarely held that "me, too" evidence is not relevant under Federal Rule of Evidence 401, and/or should be excluded under Rule 403. The Tenth Circuit's decision here conflicts with those other cases.

A. The Tenth Circuit's Decision Is Not Fact-Specific.

Mendelsohn suggests that the Tenth Circuit's decision is fact- and case-specific. She is incorrect.

Several circuits have held that "me, too" evidence *never may be admitted*, as it is irrelevant. The Tenth Circuit now has held, however, that such evidence *never may be excluded*, even under Rule 403. Mendelsohn contends that the Tenth Circuit held that evidence of other employees is admissible only if it is "logically or reasonably tied to the decision to [lay off] Mendelsohn." (Opp. at 2; internal quotations omitted.) In fact, however, the majority opinion's reasoning was circular. The majority held that the "me, too" witnesses are "logically and reasonably tied" to Mendelsohn's circumstances — and that it is reversible error to exclude them — if there is a common scheme or plan affecting others. It then held that a common scheme or plan exists simply because there are "me, too" witnesses.

Thus, this is not a case involving proof of a scheme to discriminate — say, a directive from senior management, or

discussions of managers hatching a plot among themselves.[1] Mendelsohn simply identified five persons (out of 15,000 laid off by Sprint during the telecommunications industry's recession in 2001-02) who wished to contend that they believed that consideration of age tainted their own layoffs. None worked in Mendelsohn's department, and none was laid off by Paul Reddick (the executive who decided to lay off Mendelsohn), by any person reporting to Reddick, or even by Reddick's own boss, Bill Blessing. The only connection between Mendelsohn and the five disputed witnesses was that they all worked for Sprint somewhere at its vast headquarters campus in Kansas City.[2]

---

1. The only company-wide policy cited by Mendelsohn is Sprint's Displacement Guidelines (Opp. at 5-6; Opp. App. 1b-2b), but nothing in them is discriminatory. To the contrary, the guidelines ask supervisors in making layoff decisions to give weight to length of service with Sprint. That if anything gives a leg up to older workers, because length of service normally correlates positively with age. Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 603 (3d ed. 1996) ("RIFs by inverse seniority almost always withstand ADEA challenge because they tend to favor older workers."). Mendelsohn's suggestion that one or more Sprint supervisors supposedly made age-based remarks (Opp. at 3 & n.4) or supposedly saw age-related data on RIF worksheets (Opp. at 5) is precisely why the district court had excluded the witnesses who would tell about them: None of the supervisors in question had anything to do with Mendelsohn or the decision to lay her off.

2. Mendelsohn contends, erroneously, that the district court permitted Sprint to produce evidence pertaining to decisionmakers other than Reddick but did not extend the same opportunity to Mendelsohn. (Opp. at 2, 4.) That is incorrect. The district court informed both sides that evidence of decisions pertaining to layoffs by Reddick, or by Reddick's own boss, Blessing, would be admissible. Both sides were free to present statistical and other evidence pertaining to those 75 layoff decisions. The five excluded witnesses were not among the 75; they bore no relationship to Mendelsohn, Reddick or Blessing. Mendelsohn notes that the jury was permitted to hear evidence that Reddick at about the time of the layoff accepted transferring older workers into his unit. (Opp. at 7.) That of course is relevant because it tended to disprove that

(Cont'd)

The rule of law announced by the Tenth Circuit will apply in substantially all discriminatory discharge cases. Most unhappy discharged workers seek to identify other persons who also were discharged and unhappy, and in a large layoff such persons are easy to find. If it was reversible error to exclude the "me, toos" here, it similarly will be reversible error to exclude them in every other case. A clear question of law is presented.

B. The Tenth Circuit's Decision Conflicts With Decisions From At Least Five Other Circuits.

A substantial inter-circuit conflict exists.

- **Second Circuit.**

Contrary to Mendelsohn's assertion, the Second Circuit's treatment of "me, too" evidence cannot be reconciled with that of the Tenth. In *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984), the Second Circuit held that the district court erred in permitting "me, too" witnesses to testify about the circumstances of their own terminations. *Id.* at 121. Mendelsohn ignores the court's primary holding: that "me, too" evidence is "insufficient to show a pattern and practice of discrimination" and thus should be excluded as both irrelevant and unfairly prejudicial. *Id.* at 122; *accord Martin v. Citibank, N.A.*, 762 F.2d 212, 217 (2d Cir. 1985) (individuals who "had nothing to do with" the employment decision challenged by plaintiff should not be permitted to testify about the plaintiff's claim).

- **Third Circuit.**

The Third Circuit's approach also differs from that of the Tenth. In *Moorhouse v. Boeing Co.*, 501 F. Supp. 390 (E.D. Pa.), *aff'd*, 639 F.2d 774 (3d Cir. 1980), the district court excluded the testimony of five employees who, like the plaintiff, alleged that they had been laid off based on age. The court explained, "[T]o the extent testimony of each witness was about his own lay off, it was not relevant to [plaintiff's] lay off." *Id.* at 392. The other Third Circuit decisions Mendelsohn cites

---

(Cont'd)

Reddick had embarked on a plan to oust older workers. Mendelsohn's five proffered witnesses, by contrast, had no light to shed on decisions made by Mendelsohn's supervisor, by Reddick, or even by Blessing.

do not contradict *Moorhouse*; in fact, they do not even involve "me, too" evidence.[3] No Third Circuit case is like the Tenth Circuit majority decision here.

- **Fourth Circuit.**

The Fourth Circuit explained that the proper focus is on the plaintiff's personal experience, not the plaintiff's coworkers' experiences. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 190 (4th Cir. 2004) (dictum). Mendelsohn incorrectly suggests that *Kozlowski v. Hampton School Bd.*, 77 Fed. Appx. 133 (4th Cir. 2003), is to the contrary, but it is not; there, evidence of prior age discrimination by the same decisionmaker as to plaintiff properly was deemed probative of the plaintiff's claim. *Id.* at 148-49. Nothing in *Kozlowski* suggests that evidence is admissible where (as here) it does not shed light on the plaintiff's decisionmaker's thought processes.

- **Fifth Circuit.**

Mendelsohn characterizes as "ad hoc" the Fifth Circuit's holdings. (Opp. at 24.) In fact, however, the cases she cites all are consistent with *Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296 (5th Cir. 2000), summarized in the petition, which held that nonparty testimony is irrelevant unless the witnesses are "similarly situated" to the plaintiff. *Id.* at 302. The court then held that those "who had different supervisors than the plaintiff, who worked in different parts of the employer's company, or whose terminations were removed in time from the plaintiff's termination" were not "similarly situated" to the plaintiff and could not testify. *Id.*

---

3. *Glass v. Philadelphia Electric Co.*, 34 F.3d 188, 192-93 (3d Cir. 1994) (plaintiff sought to show that *he alone* had been harmed by the allegedly hostile environment in which he had worked; there was no indication that the plaintiff intended to introduce testimony from any other employees); *Becker v. Arco Chemical Co.*, 207 F.3d 176, 184-85 (3d Cir. 2000) (plaintiff was permitted to recount potentially discriminatory statements made by both his supervisor — the decisionmaker as to plaintiff — and others while in the presence of plaintiff's supervisor; there was no issue of "me, too" evidence involving nondecisionmakers; the disputed evidence shed light on the motives of the supervisor-decisionmaker).

Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106 (5th Cir. 1995), is fully consistent with *Wyvill*. In *Shattuck*, a particular witness could recount the decisionmaker's discriminatory statements; the evidence thus was highly relevant.[4] *Shattuck* has nothing to do with the instant case, because here the Tenth Circuit announced that *all* nonparty testimony is admissible, even when it is untethered to the plaintiff's circumstances and the plaintiff's decisionmaker.

Mendelsohn also cites *Harpring v. Continental Oil Co.*, 628 F.2d 406 (5th Cir. 1980). *Harpring*, however, affirmed a district court that had *excluded* proffered evidence of another putative discriminatee. Thus, *Harpring* supports Sprint's position here, not Mendelsohn's. Mendelsohn cites dictum in *Harpring* about the potential role of "me, too" testimony in other cases, but that dictum is limited to pattern-or-practice cases where by definition the treatment of others is relevant. *Id.* at 410. Here, however, Mendelsohn by the time of the Pretrial Conference Order had abandoned any pattern-or-practice contention. Thus, it is *not* true, as Mendelsohn repeatedly contends, that "anecdotal evidence from other employees is generally admissible." (Opp. at 27 (internal quotation omitted); *see also* Opp. at 8, 10, 14.) That only is the rule in class actions. *Teamsters v. United States*, 431 U.S. 324, 339 (1977) (in a class action, individual instances of discrimination bring "the cold numbers convincingly to life"); EMPLOYMENT DISCRIMINATION LAW, *supra* note 1, at 45 (in a class action, "anecdotal evidence of individual instances of discriminatory treatment" supplement the statistical evidence). The instant case is not a class action, and Mendelsohn presented no statistical proof.

The Tenth Circuit's decision here therefore conflicts with those from the Fifth Circuit.

---

4. 49 F.3d 1109. The court also held that testimony regarding "a similar statement by a district manager outside [plaintiff's] chain of command" went "afield," but that no prejudicial error had occurred given the record as a whole, because it was "merely cumulative" of other, admissible evidence. *Id.* at 1110.

- **Sixth Circuit.**

Mendelsohn mischaracterizes the Sixth Circuit cases. In *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1988), the court excluded the proffered "me, too" evidence, emphasizing that the plaintiff and nonparty witnesses did not share the same decisionmaker-supervisor. *Id.* at 156. Mendelsohn's witnesses here were not germane to her claims in any respect. Similarly, in *Williams v. Nashville Network*, 132 F.3d 1123 (6th Cir. 1997), considerations such as whether the plaintiff and witnesses applied for the same position, and whether they did so at the same time, were part of the court's ultimate inquiry as to whether the plaintiff and the proffered "me, too" witnesses had the same decisionmakers. *Id.* at 1130.

The rule in the Sixth Circuit thus differs from that in the Tenth.

- **Seventh Circuit.**

Mendelsohn cannot reconcile the Seventh Circuit's decision in *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986), with the Tenth Circuit majority's opinion here. *Hunter* does not stand for the proposition that "me, too" evidence is admissible where it bears no relation to the individuals responsible for the plaintiff's alleged harm. The nonparty testimony was relevant in that case because the same supervisors and managers were at issue. *Id.* at 1422.

Similarly, in *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93 (7th Cir. 1985), the court admitted nonparty witness testimony only after the plaintiff introduced evidence that "the Company's President and Chairman [had stated] that the Company wished to eliminate its older employees." *Id.* at 97. *Stumph* therefore involved independent evidence of a common scheme or plan of discrimination. Here, by contrast, the Tenth Circuit held it reversible error to exclude "me, too" evidence *without* any independent evidence linking the nonparty witnesses' testimony to the plaintiff's circumstances.

- **Other circuits.**

Mendelsohn cites decisions from the First and Eighth circuits that arguably can be reconciled with the Tenth Circuit

majority's decision here. Those decisions, however, if anything simply underscore that the conflict in the court of appeals cases is significant and must be resolved.

C. The Tenth Circuit's Own Cases Also Are In Disarray, But Whether They Can Be Reconciled Is Beside The Point.

Mendelsohn devotes a substantial portion of her opposition to an effort to reconcile the Tenth Circuit's majority opinion with prior Tenth Circuit cases. (Opp. at 10-14.) She is incorrect — *Mendelsohn* is impossible to square with prior circuit precedent, as dissenting Judge Tymkovich demonstrated — but whether the Tenth Circuit's own decisions are consistent is of little moment. The full Tenth Circuit has had its chance to rehear the case *en banc*; it voted 7-5 not to do so. Sprint's petition demonstrated that the majority opinion conflicts with decisions from at least five *other* circuits (and pointed dictum from a sixth). That kind of *inter*circuit conflict is the strongest possible reason to exercise *certiorari* jurisdiction, S. Ct. R. 10(a), regardless of whether there is an *intra*circuit conflict.

II. The Rule 403 Issue Is Properly Presented.

Mendelsohn argues that the admissibility of "me, too" evidence under Rule 403 is not a proper subject upon which to grant *certiorari*. (Opp. at 27.) She is incorrect.

A. Rule 403 Findings Are Not Required.

As this Court explained in *Huddleston v. United States*, 485 U.S. 681 (1988), otherwise-admissible evidence is always subject to "general strictures limiting admissibility such as Rule[] . . . 403." *Id.* at 688. *Accord United States v. 50 Acres of Land*, 469 U.S. 24, 35 (1984) (Rule 403 is a "generally applicable" rule of evidence). Thus, even "where Rule 403 is not invoked, the trial judge's balancing will be subsumed in his ruling." *United States v. Long*, 574 F.2d 761, 766 (3d Cir. 1978), *cert. denied*, 439 U.S. 985 (1978). *Accord United States v. Cruz-Garcia*, 344 F.3d 951, 956 n.4 (9th Cir. 2003) ("[A]ll otherwise admissible evidence is nevertheless subject to 403 balancing. Thus, 403 is, in a sense, incorporated into all other rules of evidence."). This Court therefore assumes that the district court

weighed the probative value of the "me, too" evidence against its potential to cause unfair prejudice (and other relevant factors) and concluded that the evidence should be excluded under Rule 403, even though the order did not recite reliance on Rule 403.

It thus is of no consequence that the district court did not engage in an explicit balancing of the Rule 403 factors. Trial courts are not required to make detailed, on-the-record findings under Rule 403 if the balancing factors are evident from the record.[5] Here, the factors militating against the introduction of Mendelsohn's "me, too" evidence are obvious. As the district court noted, Mendelsohn's layoff decisionmaker, Reddick, did not participate in the decisions to lay off any of the five disputed witnesses. The court therefore held that those individuals were not "similarly situated" to Mendelsohn and excluded their testimony accordingly. (Pet. App. 24a.) Inherent in the court's decision was its recognition that Mendelsohn's proffered "me, too" evidence would have distracted the jury from its proper focus — the circumstances of Mendelsohn's own layoff — and delayed the litigation with a series of unfairly prejudicial "mini-trials." Rule 403 exists precisely to prevent such confusing and unfairly prejudicial testimony.[6]

---

5. *See Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 885 (8th Cir. 2006) (district court's failure to record its Rule 403 balancing was not an abuse of discretion); *United States v. Pitre*, 960 F.2d 1112, 1126 (2d Cir. 1992) (same); *Navarro de Cosme v. Hospital Pavia*, 922 F.2d 926, 931 (1st Cir. 1991) (same); *United States v. Bradshaw*, 935 F.2d 295, 301 (D.C. Cir. 1991) (same); *United States v. Ono*, 918 F.2d 1462, 1465-66 (9th Cir. 1990) (same); Jack B. Weinstein & Margaret A. Berger, 1 *Weinstein's Federal Evidence* § 403.02 (Joseph M. McLaughlin ed., 2006) ("[A] trial court's failure to make explicit findings on the record for a simple decision under Rule 403 does not constitute an abuse of discretion per se.").

6. *See Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 1732 (2006) (judges are permitted "to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues'") (quoting *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986)) (internal citation omitted; alteration in original).

In addition, the Rule 403 issue is properly presented because the Tenth Circuit itself analyzed the effect of Rule 403 (Pet. App. 29a). The panel's (erroneous) analysis of the issue preserves it for this Court's review, even if this were a case in which the lower court could have held the issue waived.[7]

B. The Court Of Appeals Stripped District Courts Of Discretion To Exclude Evidence Under Rule 403.

Mendelsohn erroneously suggests that the Tenth Circuit held open the possibility of excluding "me, toos" under Fed. R. Evid. 403. (Opp. at 14.) Not so. The court did say that district courts retain authority to exclude "cumulative" evidence (Pet. App. 15a), but it said nothing about the other factors listed in Rule 403: "unfair prejudice, confusion of the issues, . . . misleading the jury, or . . . considerations of undue delay, [or] waste of time." "Cumulative evidence" is only one of multiple considerations under Rule 403, and the Tenth Circuit accorded district courts no latitude to exclude evidence under any of the others.[8]

---

7. *See United States v. McVeigh*, 153 F.3d 1166, 1189 (10th Cir. 1998) (appellate court may conduct a *de novo* balancing under Rule 403 even if the district court failed to do so, and the record contains sufficient evidence of balancing factors); *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 191 (3d Cir. 1994) (if a trial court fails to articulate its balancing under Rule 403, the appellate court may either "'decide the trial court implicitly performed the required balance, [or] undertake to perform the balance [itself]'").

8. Mendelsohn notes that dissenting Judge Tymkovich would have held that the issue was one subject to the trial court's discretion; in his view, it would not have been reversible error to admit or to exclude the evidence. (Opp. at 14, *citing* Pet. 20a.) Mendelsohn accurately quotes the dissenting opinion, but that is a further reason to grant the petition, not a reason to deny it. As shown in the petition, there are three distinct lines of cases. Some hold "me, too" evidence totally irrelevant, and that it is reversible error to admit it. Other cases hold that "me, too" evidence is subject to Rule 403 balancing, with the district judge's discretion rarely disturbed. (Judge Tymkovich's dissenting opinion puts in him this camp.) And a very few courts, like the Tenth Circuit majority here, hold that it is reversible error to exclude "me, too" evidence. The conflict in the court of appeals cases is clear and substantial.

The Tenth Circuit also referenced a trial court's right to issue instructions on the "limitations" of testimony (Pet. App. 13a), but that is inapplicable to the evidence at issue here. This is not a case (and it is hard to conceive of a case) in which "me, too" evidence is offered for a limited purpose; such evidence always is offered on the ultimate question of discrimination *vel non*.

Rule 403 considerations are especially important in reduction-in-force cases like this one. Mendelsohn takes issue with Sprint's use of a ranking system in making RIF decisions (Opp. at 4, 7), but making hard calls — deciding which adequately performing incumbent to release, given the need to cut back — is the essence of a RIF. That is precisely why the Tenth Circuit's decision violated Rule 403. Most any RIF plaintiff can present a plausible argument that he or she could have been retained, and most any RIF plaintiff can find other persons with sympathetic stories who can and desire to say the same thing. Juror sympathy in these circumstances is inevitable, which is why Rule 403 gives district judges the discretion to exclude evidence as unfairly prejudicial. As the Second Circuit put it, in reversing a plaintiff's verdict abetted with "me, too" proof: "Even the strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age." *Haskell v. Kaman Corp.*, 743 F.2d 113, 122 (2d Cir. 1984) (citation omitted). Here, however, the Tenth Circuit majority departed from *Haskell* and other cases, and held that it was reversible error, even under Rule 403, to exclude the proffered witnesses.

CONCLUSION

The Tenth Circuit's decision conflicts with those from at least five other circuits on a recurring and "controversial" question of law, *see* EMPLOYMENT DISCRIMINATION LAW, *supra* note 1, at 30. This Court should grant *certiorari*.

Respectfully submitted,

PAUL W. CANE, JR.
Counsel of Record
KATHERINE C. HUIBONHOA
HEATHER N. MITCHELL
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
55 Second Street,
Twenty-Fourth Floor
San Francisco, CA 94105
(415) 856-7000

Attorneys for Petitioner